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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 228

SAFEWAY TRAILS, INC., a Corporation of the State of Maryland, *Appellant*

v.

DAVID D. FURMAN, Attorney General of the State of New Jersey and Head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles; and JOHN A. [illegible]RVICK, State Treasurer of New Jersey

On Appeal From The Supreme Court Of The State Of New Jersey

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division, is reported at 76 N. J. Super. 90, 183 A. 2d 788 (1962). The opinion of the Supreme Court of New Jersey, reversing the judgement of the Superior Court, Law Division, is reported at 41 N. J. 467, 197

A. 2d 366 (1964). The opinions of the Superior Court, Law Division and the Supreme Court of New Jersey and the judgement of the Supreme Court of New Jersey are set forth in the Appendix, *infra*.

JURISDICTION

This suit was instituted by the filing of a complaint by appellant in the Superior Court of New Jersey, Law Division, on April 3, 1961, pursuant to Title 2 A of New Jersey Statutes Annotated, Sections 16 - 50 *et seq.*, for a declaratory judgement with respect to the proper application of the Interstates Busses Excise Tax, Title 48 of New Jersey Statutes Annotated, Section 4 - 20 (N.J.S.A. 48:4-20), and for a judgement with respect to the constitutionality of that statute insofar as it may be held to apply to miles traversed by interstate busses over the New Jersey Turnpike. The complaint also sought an injunction restraining the appellees, officers of the State of New Jersey, from enforcing N.J.S.A. 48:4-20 with respect to interstate mileage traveled by appellant's busses on the New Jersey Turnpike, and a mandatory injunction requiring the appellees to refund all sums paid by appellant under N.J.S.A. 48:4-20 on account of interstate mileage traversed on the New Jersey Turnpike.

It was alleged that N.J.S.A. 48:4-20 did not apply to mileage traversed over the New Jersey Turnpike, but that if it were found to apply to such mileage, the state was repugnant to the Constitution of the United States and invalid. The Superior Court of New Jersey, Law Division, found that the statute did not apply to mileage traveled on the New Jersey Turnpike. The Supreme Court of New Jersey held that N.J.S.A. 48:4-20 did apply to the New Jersey Turnpike, and that, as applied to miles traversed by appellant's interstate

busses over the New Jersey Turnpike, the statute was valid. The decision and judgment of the Supreme Court of New Jersey were issued on February 3, 1964.

Notice of appeal was filed by Safeway Trails, Inc., on May 2, 1964, with the Supreme Court of New Jersey.

The jurisdiction of the Supreme Court of the United States to review the judgement of the Supreme Court of New Jersey on appeal is conferred by 28 U. S. Code, Section 1257 (2). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 51 S. Ct. 380 (1931); *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931); *Hicklin* v. *Coney*, 290 U. S. 175, 78 L. Ed. 251, 54 S. Ct. 142 (1933); *Aero Mayflower T. Co.* v. *Georgia Pub. Serv. Comm.*, 295 U. S. 285, 79 L. Ed. 1439, 55 St. Ct. 709 (1935); *Ingels* v. *Morf*. 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439 (1937); *Dixie Ohio Express Co.* v. *State Rev. Com.*, 306 U. S. 72, 83 L. Ed. 495, 59 S. Ct. 435 (1939); *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950); *Bode* v. *Barrett*, 344 U. S. 583, 97 L. Ed. 567, 73 S. Ct. 468 (1953).

STATUTE INVOLVED

N.J.S.A. 48:4-20

L. 1934, c. 68. May 7, 1934 [1]

Every person owning or operating an autobus which is operated over any highway in this state for the purpose of carrying passengers from a point outside the state to another point outside the state, or from a point outside the state to a

[1] An amendment in December 1962 substituted "Director of the Division of Motor Vehicles" for "commissioner of motor vehicles."

point within the state, or from a point within the state to a point outside the state shall pay to the commissioner of motor vehicles, as an excise for the use of such highway, one-half cent for each mile or fraction thereof such autobus shall have been operated over the highways of this state, except that no excise shall be payable for mileage traversed in any municipality to which such owner or operator has paid a monthly franchise tax for the use of its streets under the provisions of section 48:4-14 of this title.

QUESTIONS PRESENTED

Is the application of the mileage tax imposed under N.J.S.A. 48:4-20 to Safeway Trails, Inc., an interstate autobus carrier, with respect to its interstate mileage on the New Jersey Turnpike in conflict with the Constitution of the United States, specifically:

1. The equal protection clause of the Fourteenth Amendment, because Safeway Trails, Inc., is subjected to a tax as well as tolls while intrastate autobus carriers do not pay a tax but only tolls for mileage on the New Jersey Turnpike?

2. The commerce clause in Article 1, Section 8, clause 3, because the tax is discriminatory against interstate commerce and has no reasonable relation to the cost of constructing or maintaining the highways with respect to which the tax is imposed?

STATEMENT

Safeway Trails, Inc., a Maryland corporation authorized to do business in New Jersey, is engaged in the interstate transportation of passengers, principally between Washington, D. C. and New York City and between Philadelphia, Pa. and New York City, pursuant to certificates issued by the Interstate Commerce

Commission. In the conduct of its operations, Safeway Trails, Inc. traverses the New Jersey Turnpike as well as other roads and highways within the State of New Jersey. In 1960, the appellant's operations covered 8,741,382 miles within New Jersey, of which 7,019,633 miles were over the New Jersey Turnpike and 1,721,749 miles were over other highways. Similarly in 1961, out of a total of 9,567,888 miles operated in New Jersey, 7,833,728 were over the New Jersey Turnpike and 1,734,160 were over other highways.

When the New Jersey Turnpike was opened to use in 1951, the State of New Jersey, relying upon the Attorney General's Formal Opinion No. 78-1950, that the mileage tax imposed under N.J.S.A. 48:4-20 would not apply to mileage over the Turnpike, did not attempt to levy a tax upon Safeway Trails, Inc. for its interstate mileage on the Turnpike. Safeway Trails, Inc. in part in reliance on this ruling, with the consent of Federal and State authorities, diverted most of its through interstate operations making no service stops within New Jersey to the Turnpike. However, all autobus carriers, interstate and intrastate, as well as all other vehicles traversing the Turnpike, were required to pay tolls set by the New Jersey Turnpike Authority. These tolls were designed to meet all of the costs of maintaining and operating the Turnpike, as well as making payments of interest and principal on the bonds issued by the Turnpike Authority. That receipts from tolls were adequate to cover all of the obligations of the Turnpike is indicated by the fact that at the end of 1960 the Authority had greatly anticipated its debt obligations and there was a reserve available of approximately $31 million.

On April 18, 1960, the Attorney General of New Jersey, at the request of the taxing authorities, issued

Formal Opinion No. 11—1960, reversing Formal Opinion No. 78—1950, and holding that mileage traversed by interstate busses on the Turnpike was subject to the tax imposed under N.J.S.A. 48:4-20. Following receipt of a notice from the acting motor vehicles commissioner calling for the reporting and payment of the said tax on its interstate Turnpike mileage, and to avoid severe penalties (N.J.S.A. 48:4-30 and 48:4-32), Safeway Trails paid the one-half cent per mile tax pursuant to N.J.S.A. 48:4-20 under protest, beginning on June 1, 1960.

On April 3, 1961 Safeway Trails, Inc. filed a complaint with the Superior Court of New Jersey, Law Division, in which it sought: (1) a declaration that the State was acting unlawfully in applying the provisions of N.J.S.A. 48:4-20 to its interstate mileage on the Turnpike; (2) an injunction against the further application of the provisions of this statute to such interstate mileage on the Turnpike; and (3) a mandatory injunction that the State be required to refund all sums paid in respect to its interstate mileage over the Turnpike.

In its decision of July 31, 1962, the Superior Court of New Jersey, Law Division held that the New Jersey Turnpike was not a "highway" within the meaning of N.J.S.A. 48:4-20, restraining the State from thereafter enforcing N.J.S.A. 48:4-20 with respect to interstate mileage traveled on the Turnpike, and ordered the State to refund all sums paid under N.J.S.A. 48:4-20 on account of interstate mileage traversed over the Turnpike since June 1, 1960. Subsequently the State appealed, and the Supreme Court of New Jersey, on February 3, 1964, reversed the decision and judgement of the Superior Court, and held that the provisions of

N.J.S.A. 48:4-20 applied to the New Jersey Turnpike, and that Safeway Trails, Inc. was required to make payments pursuant to 48 N.P.S.A. 4-20 for mileage by its busses operating in interstate service over the New Jersey Turnpike. The decision of the Supreme Court of New Jersey held that such application of the statute was not in violation of the Constitution of the United States.

During the calendar year 1961, Safeway Trails, Inc. paid the New Jersey Motor Fuel Tax of $179,360.00, the New Jersey Corporate Business Tax of $8,600.96, the New Jersey registration tax of $186.00, and New Jersey payroll taxes amounting to $500.58. For the period from June 1, 1960 to May 31, 1961, Safeway Trails, Inc. paid total tolls to the New Jersey Turnpike Authority of $218,042. During this same period Safeway Trails, Inc. paid pursuant to N.J.S.A. 48:4-20 a mileage tax of $9,033.12, based upon its mileage traveled over State highways in New Jersey other than the Turnpike. In addition, for this same period from June 1, 1960 to May 31, 1961, Safeway Trails, Inc. paid the State of New Jersey $36,611.98, under protest, pursuant to N.J.S.A. 48:4-20 for interstate mileage traversed over the New Jersey Turnpike.

All monies derived from the tax imposed by N.J.S.A. 48:4-20 are deposited in the general fund of the State of New Jersey and are appropriated by N.J.S.A. 48:4-23 to the State Highway Commission for use by it for the construction and maintenance of highways. The State of New Jersey can not divert such funds in any form or manner to the New Jersey Turnpike Authority, or to render services for the Turnpike Authority. *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 235, 69 A. 2d. 875 (1949). The State of New Jersey does not

contend that the sums it receives pursuant to the application of N.J.S.A. 48:4-20 for interstate mileage traversed over the New Jersey Turnpike would be used in the maintenance, supervision or repair of the Turnpike, since such use would be forbidden under the laws of the State of New Jersey. On trial it was established that even the most minute expenditure by the State of New Jersey assignable to the benefit of the Turnpike is reimbursed from toll revenue.

The State of New Jersey has conceded that the New Jersey Turnpike is used by intrastate autobusses, as well as by interstate carriers, and that the intrastate carriers pay only the tolls required by the Turnpike Authority, and are not subject to the excise levied by N.J.S.A. 48:4-20. The State has contended, and the Supreme Court of New Jersey so found, that there is no discrimination because intrastate carriers are subject to a franchise tax pursuant to N.J.S.A. 48:4-14. New Jersey bus companies performing intrastate, intercity services are accorded a mileage proration for mileage used within municipal and township limits, including Turnpike mileage, which results in reducing or eliminating taxes comparable with those required to be paid by Safeway Trails, Inc. N.J.S.A. 48:4-15 and 48:4-20. No mileage tax on interstate Turnpike mileage is levied on trucks or private vehicles.

Safeway Trails, Inc. contended at every stage of the proceeding, commencing with the filing of its compaint on April 3, 1961 that the application of N.J.S.A. 48:4-20 to its interstate mileage on the Turnpike would be in violation of the Constitution of the United States, in that it would deprive Safeway Trails, Inc. of the equal protection of the laws guaranteed by the Fourteenth Amendment and in that it would constitute an undue

and discriminatory burden upon interstate commerce contrary to Article 1, Section 8, Clause 3. The Constitutional questions were raised in the Superior Court of New Jersey, Law Division, as noted in the decision by that Court, and again in the briefs and argument before the Supreme Court of New Jersey. The Constitutional objections raised by Safeway Trails, Inc. were not reached by the Superior Court, Law Division, which found for appellant on other grounds but were considered and rejected by the Supreme Court of New Jersey in its decision.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important constitutional questions involving the extent to which a State may tax an interstate carrier in order to raise revenues for general governmental costs other than costs incurred for the benefit of interstate commerce. This Court has, in past decisions involving state taxation of interstate businesses, including interstate transportation companies, provided general guidelines and limitations upon State action, but in their ever broadening search for additional revenues, the various States have devised and levied new taxes upon interstate businesses. (See *State Taxation of Interstate Commerce,* House Report No. 1480, 88th Congress, 2nd session.) The tax statute here in question, 48 N.J.S.A. 48:4-20, was enacted in 1934, after this Court had marked the course through its decisions in *Hendricks* v. *Maryland,* 235 U. S. 610, 59 L. Ed. 385, 35 S. Ct. 140 (1915), *Kane* v. *New Jersey,* 242 U. S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916), *Clark* v. *Poor,* 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702 (1927), *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230 (1928), *Sprout* v. *South Bend,* 277 U. S. 163, 72 L. Ed. 833, 48 S. Ct. 502

(1928), *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 51 S. Ct. 380 (1931), *Smith* v. *Cahoon*, 51 S. Ct. 582, 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931), *Continental Baking Co.* v. *Woodward*, 286 U. S. 352, 76 L. Ed. 1155; 52 S. Ct. 595 (1932), and *Hicklin* v. *Coney*, 290 U. S. 169, 78 L. Ed. 247, 54 S. Ct. 142 (1933).

The validity of that statute, construed as inapplicable to interstate turnpike bus mileage, was not contested until the State of New Jersey in 1960 attempted without judicial sanction to administratively extend its coverage to include mileage of interstate autobusses on the New Jersey Turnpike. The decision by the Supreme Court of New Jersey upholding the validity of the tax as so applied challenges the limitations on state encroachment upon interstate commerce and, if left unchecked, carries obvious implications. The precise points in issue have not been settled by this Court, but, based upon the fundamental principles heretofore enunciated, it is believed that the application of the tax here in question is in violation of the Constitution of the United States. In no prior case has such a discriminatory levy on interstate commerce been upheld in the absence of any lawful expenditure by a state for support of facilities used by the interstate carrier.

1. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931), involved a Florida statute regulating motor carriers using its highways, including a tax based upon a mileage formula. Among those exempted from regulation were certain carriers of agricultural, food and horticultural products. The statute did not distinguish between common and private carriers. The appellant was a private carrier for hire, contracted to

carry products not unlike those which were included in the exemptions from regulation. This statute was held to deny the appellant the equal protection of the laws. Though a State has broad discretion in classification, the classification employed must have a valid relation to the purpose for which it is made. The classification in the Florida statute differentiated between two kinds of carriers, each of which hauled food products, and both made the same type of use of the highways. Moreover, the exempted and the regulated carriers were both engaged in transporting property for compensation over the highways of the State, between fixed termini or over regular routes.

In *Continental Baking Co.* v. *Woodward*, 286 U. S. 352, 76 L. Ed. 1155, 52 S. Ct. 595 (1932), this Court upheld the validity of a Kansas statute which classified common, contract and private carriers. The exemption, for one carrying his own produce to market, was found to be reasonable and permissible. The Court distinguished *Smith* v. *Cahoon, supra*, finding that the Kansas statute was more precise and its classifications were reasonable and proper.

In *Hicklin* v. *Coney*, 290 U.S. 169, 78 L. Ed. 247, 54 S. Ct. 142 (1933), a South Carolina statute regulating motor carriers provided for license fees based upon the capacity of the vehicles. This act exempted from regulation farmers or dairymen hauling their own products or lumbermen hauling logs or timber. The appellant was a contract carrier who challenged the validity of the statute claiming that it denied him equal protection of the laws and constituted a burden on commerce. This Court affirmed the state court in finding that the act did not violate the Constitution. As to the challenge with regard to burden

on commerce, it was held that the State could properly base its license fees on the capacity of the vehicles. With regard to the question of equal protection, this Court found the classification made by the exemption to be a proper one. Distinguishing the case from *Smith* v. *Cahoon,* though noting that the exemptions were broader than in the *Continental Baking* case, this Court found that the classification was reasonably based upon the use made of the highways, and that the exempted carriers would make seasonal or occasional use of the highways while the appellant, and like carriers, were regular users of the highways.

Again in *Aero Mayflower T. Co.* v. *Georgia Publ. Serv. Comm.,* 295 U. S. 285, 79 L. Ed. 1439, 55 S. Ct. 709 (1935), this Court found a classification made in a Georgia statute, exempting from regulation and licensing carriers of farm products and passengers (with limitations as to quantity) between points not having rail service, to be proper based upon the more limited use such exempted carriers would make of the highways. As to a further exemption of carriers of farm products so long as the title to the products remained in the producer, the Court held that such a classification was reasonable in light of findings by the State Supreme Court that farmers theretofore were overly burdened by taxes, and the relief granted by the statute should be considered as an exemption of the products, and not of the carrier, therefore equalizing the tax burden.

In *Dixie Ohio Express Co.* v. *State Revenue Com.,* 306 U. S. 72, 83 L. Ed. 495, 59 S. Ct. 435 (1939), a Georgia statute placed annual fees on trucks and busses, whether engaged in interstate or intrastate commerce, but charged a greater fee on for-hire carriers than on

vehicles which are not used in for-hire service. After finding that the licensing scheme did not constitute a burden on commerce (*infra*), this Court held that the classification exempting not for-hire carriers was a proper one, noting that such carriers were more likely to make only occasional or accessorial use of the highways while the business of for-hire carriers depended on the number of loads carried and miles traversed.

In finding that the application of N.J.S.A. 48:4-20 to interstate mileage on the New Jersey Turnpike did not deny to Safeway Trails the equal protection of the laws, the Supreme Court of New Jersey made no attempt to demonstrate the reasonableness of the classification. Considering the use made of the Turnpike by the exempted (intrastate) carriers, the classification is clearly improper. Whereas in *Smith* v. *Cahoon* this Court found that exempted carriers made the same use of the highways as those carriers subject to regulation, and therefore held the statute invalid, in the *Continental Baking, Hicklin,* and *Dixie Ohio Express* cases this Court, finding a difference in the use to be made of the highways, upheld the classification as reasonable and proper. Moreover, in *Hicklin,* where the question of use was not as clear, this Court found the classification reasonable in view of the State Court's finding that the exemption would serve to equalize the tax burden which had existed. It has been conceded by the State that intrastate autobusses make regular use of the Turnpike in the conduct of their operations, but the extent of such operations over the Turnpike, though substantial, is not recorded. Moreover, there is no allegation that the intrastate carriers using the Turnpike have been unduly burdened in comparison to interstate carriers with regard to taxes levied upon them. As heretofor noted, such carriers are exempted in large

part from gross revenue and other taxes by reason of operation through municipalities.

The classification exempting intrastate autobusses from paying a mileage tax for miles operated over the Turnpike has no reasonable basis. Safeway Trails, Inc., being required to pay such a tax, amounting to $36,611.98 during a one year period, in addition to its payment of tolls to the Turnpike, totaling $218,042.45 during the same period, has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Appellant agrees that a State may impose a reasonable and non-discriminatory tax upon interstate carriers which use its highways to compensate the State for the cost of construction, maintenance and supervision of these highways. Appellant does not contend that N.J.S.A. 48:4-20 as applied to non-turnpike mileage prior to June 1, 1960 was unreasonable or discriminatory. It is the application of this mileage tax to miles traveled on the New Jersey Turnpike, with respect to which the State is prohibited by law from making expenditures, which is the basis for appellant's contention that this tax, as applied to it, is both unreasonable and discriminatory, constituting a burden on interstate commerce in violation of the Commerce Clause, Article 1, Section 8, clause 3 of the Constitution of the United States.

In *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 51 S. Ct. 380 (1931), this Court struck down a Tennessee statute which levied a privilege tax on interstate busses, the amount based upon carrying capacity. This Court noted that a State may impose a tax upon a carrier engaged exclusively in interstate commerce to compensate the State for the use of its public high-

ways, the charge being a fair contribution to the cost of constructing, maintaining, and policing the highways. Such a tax cannot be sustained, since it is a direct burden on interstate commerce, unless it is demonstrated that it is levied only as compensation for the use of the highways. Where the tax bears no reasonable relation to the privilege granted, or is discriminatory, the tax cannot be sustained.

Capitol Greyhound Lines v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950) involved a Maryland statute which required the payment of a registration fee based upon the value of the bus for every vehicle which used the highways of that State. The appellant, an interstate bus carrier, had alleged that the tax was invalid as a burden on interstate commerce. This Court, in upholding the validity of the statute, found that there was no discrimination against interstate commerce, since the tax applied to intrastate carriers as well as interstate; the tax receipts were used wholly for road construction and maintenance or administration of the highway laws; and there had been no allegation by the appellant that the amount of the tax was unreasonable as applied to its operations.

In *Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653, 57 S. Ct. 439 (1937), this Court held as unconstitutional a California statute placing a tax on automobiles transported in interstate commerce over its highways, where such automobiles were transported for the purpose of being sold at their destination. The statute was found to be a burden on interstate commerce in that, rather than constituting a reimbursement for the expenses of the State in providing and maintaining highways, or of enforcing regulations governing the highways, the tax imposed was unreasonably excessive. Where the burden

placed upon an interstate carrier is excessive and not compensatory for the privilege of the use of the highways, the tax must fall. Compare, *Morf* v. *Bingaman*, 298 U. S. 407, 80 L. Ed. 1245, 56 S. Ct. 756 (1936).

In *Bode* v. *Barrett*, 344 U. S. 583, 97 L. Ed. 567, 73 S. Ct. 468 (1953), involving an Illinois statute which placed a tax on all vehicles for the use of the highways, the tax to be measured by the gross weight of the vehicle, this Court found that there was not an improper burden on interstate commerce. The tax applied alike to intrastate and interstate carriers, and therefore could not be considered to be discriminatory. The appellants, who were engaged in both intrastate and interstate commerce, did not show that the tax was increased by reason of their interstate operations, nor that the tax had no reasonable relation to the use made of highways in intrastate commerce.

In *Dixie Ohio Express* v. *State Revenue Com., supra*, this Court concluded that a Georgia tax assessed on all motor carriers, whether engaged in interstate or intrastate commerce, for the privilege of using the highways of the State was not a burden on interstate commerce, even though the funds received were not to be used for repair and maintenance of the highways over which the appellant, an interstate carrier, operated. The tax involved was an annual registration fee, and was not determined on a mileage basis. In the absence of evidence that the tax was unreasonable, the statute was upheld.

From these decisions, it is clear that a State may impose a tax on interstate commerce for the privilege of using its highways, even though the funds collected are not specifically used in maintaining or policing these highways, so long as the tax is neither dis-

criminatory, and levied for the privilege of conducting interstate business, nor unreasonable, when viewed with due regard to the benefits obtained by the carrier. A State may also properly levy a tax on an interstate carrier without specifying that the tax is for the privilege of using the highways when the tax recipts are in fact used to defray the State's costs in constructing, maintaining, and policing the highways and administering regulations governing the use of the highways. N.J.S.A. 48:4-20 is levied "as an excise for the use of" the highways, and pursuant to N.J.S.A. 48:4-23 the monies collected therefrom are used for the construction and maintenance of highways.

It is the contention of Safeway Trails, Inc. that the application of this tax, which is not levied against intrastate carriers, to mileage traversed by its interstate busses over the New Jersey Turnpike is discriminatory and, as applied to Safeway Trails, Inc. constitutes a burden on interstate commerce. Moreover, the imposition of a tax for mileage traversed by interstate carriers over the New Jersey Turnpike, but the funds from which can not be used in the maintenance, repair or administration of the Turnpike, is unreasonable, bearing no relation to the privilege granted, and therefore constitutes an unreasonable burden upon interstate commerce as applied to appellant.

3. The Constitutional questions raised herein are substantial. Safeway Trails, Inc., which is here contesting the application of N.J.S.A. 48:4-20 to the mileage traversed by its busses in interstate commerce over the New Jersey Turnpike, has been required to pay to the State of New Jersey $36,611.98 during a one year period because of the said application of the tax. Safeway Trails, Inc. has a substantial interest in determin-

ing the validity of this tax as applied to its interstate mileage on the New Jersey Turnpike. If the administrative action reversing the original statutory construction is sustained without requirement of reasonable relationship to cost to the State, prohibitive mileage taxes on interstate transportation constituting barriers to free movement will result.

If the Supreme Court of New Jersey is correct in holding that this tax may be validly applied to interstate mileage on the Turnpike, then it is apparent that so long as a State declares in its statute that a tax is levied for the privilege of using its highways, that State may tax an interstate carrier for the use of roads, highways, or turnpikes concerning which the State has incurred no costs for construction maintenance or administration, and that such funds as are collected pursuant to such tax may be used by the State for general revenue purposes. Affirmation of the decision of the Supreme Court of New Jersey would amount to a reversal of *Interstate Transit* v. *Lindsey, supra.*

CONCLUSION

For the reasons above stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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APPENDIX

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY

Docket No. L-12425-60 P.W.

SAFEWAY TRAILS, INC., a corporation of the State of Maryland, *Plaintiff*,

v.

DAVID D. FURMAN, Attorney General of the State of New Jersey and head of the Department of Law and Public Safety; NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles and JOHN A. KERVICK, State Treasurer of New Jersey, *Defendants*.

THE GREYHOUND CORPORATION, a corporation of the State of Delaware, *Plaintiff*,

v.

JOHN A. KERVICK, Treasurer of the State of New Jersey, and NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles, Department of Law and Public Safety of the State of New Jersey, *Defendants*.

LINCOLN TRANSIT CO., INC., a corporation of the State of New Jersey, HILL BUS CO., a corporation of New Jersey, ROCKLAND COACHES, INC., a corporation of the State of New Jersey, HUDSON BUS TRANSPORTATION CO., INC., a corporation of the State of New Jersey, SOMERSET BUS CO., INC., a corporation of the State of New Jersey, DECAMP BUS LINES, a corporation of the State of New Jersey, MANHATTAN TRANSIT COMPANY, a corporation of the State of New Jersey, and

WESTWOOD TRANSPORTATION LINES INC., a corporation of the State of New Jersey, *Plaintiffs*,

v.

NED J. PARSEKIAN, Acting Director, Division of Motor Vehicles, Department of Law and Public Safety of the State of New Jersey, *Defendant*.

Argued—April 23, 24, 25, 1962 Decided—July 31, 1962

MR. JOSEPH HARRISON (Messrs. Harrison & Jacobs) and MR. WILLIAM A. ROBERTS of the Washington, D. C. Bar *pro hac vice* (Messrs. Roberts & McInnis) argued the cause for the plaintiff, Safeway Trails, Inc.

MR. MERRITT LANE, JR. (Messrs. McCarter & English) argued the cause for the plaintiff, the Greyhound Corporation.

MR. GEORGE M. EICHLER argued the cause for the plaintiff, Lincoln Transit Co., Inc. and the seven other plaintiffs jointed therewith.

MR. ALAN B. HANDLER, Deputy Attorney General of the State of New Jersey, argued the cause for all defendants. (Arthur J. Sills, Attorney General of the State of New Jersey)

GIULIANO, J.

Opinion

This is a suit for a declaratory judgment with respect to the proper application of the Interstate Busses Excise Tax, *N.J.S.A.* 48:4-20, and for a judgment with respect to the constitutionality of that statute insofar as it may be held to apply to miles traversed by interstate busses over the New Jersey Turnpike and the Garden State Parkway. Plaintiffs seek an injunction restraining the defendants from enforcing *N.J.S.A.* 48:4-20 with respect to interstate mileage traveled by plaintiffs' busses on the New Jersey Turnpike and the Garden State Parkway.

Plaintiffs also seek a mandatory injunction requiring the defendants to refund all sums paid by the plaintiffs under *N.J.S.A.* 48:4-20 on account of interstate mileage traversed on the New Jersey Turnpike and Garden State Parkway since June 1, 1960.

Plaintiffs, Lincoln Transit Co., Inc., Hill Bus Co., Rockland Coaches, Inc., Hudson Bus Transportation Co., Inc., Somerset Bus Co., Inc., DeCamp Bus Lines, Manhattan Transit Company and Westwood Transportation Lines, Inc., all corporations of the State of New Jersey, instituted an action in the Superior Court of New Jersey, Appellate Division (Docket #A-30-60) naming as defendant Ned J. Parsekian, Acting Director, Division of Motor Vehicles, Department of Law and Public Safety of New Jersey. Safeway Trails, Inc., a corporation of the State of Maryland, started suit in the Superior Court of New Jersey, Law Division, Essex County (Docket L-12425-60 P.W.) against David D. Furman, Attorney General of the State of New Jersey and head of the Department of Law and Public Safety, Ned J. Parsekian, Acting Director, Division of Motor Vehicles, and John A. Kervick, State Treasurer of New Jersey. The Greyhound Corporation, a corporation of the State of Delaware, instituted an action in the Superior Court of New Jersey, Chancery Division, Mercer County (Docket C-1843-60) against John A. Kervick, Treasurer of the State of New Jersey and Ned J. Parsekian, Acting Director, Division of Motor Vehicles, Department of Law and Public Safety of the State of New Jersey. These actions, in which basically the same relief was being sought, were consolidated by order of the Superior Court, Appellate Division, entered July 10, 1961 and transferred to the Superior Court, Law Division, Essex County, for trial.

All of the plaintiffs are common carriers of passengers by motor bus owning and operating autobus which traverse the highways of this State for the purpose of

carrying both interstate and intrastate passengers. By reason of their interstate operations plaintiffs are subject to and required to comply with the provisions of *N.J.S.A.* 48:4-18 *et seq.* Pursuant to *N.J.S.A.* 48:4-20, plaintiffs are obliged to pay the sum of one-half cent for each mile traveled by their busses over the highways of this State as part of an interstate journey. This sum is exacted as an excise for the use of the highways of this State. No excise is payable, however, for miles traveled in municipalities to whom monthly franchise taxes have been paid under the provisions of *N.J.S.A.* 48:4-14 *et seq.* By virtue of the provisions of *N.J.S.A.* 48:4-30 and *N.J.S.A.* 48:4-32, refusal by plaintiffs to pay the excise will expose them to the probable revocation of their motor vehicle registrations and a penalty of five dollars for each day the tax remains unpaid after it is due.

N.J.S.A. 48:4-20 has been in effect since May 7, 1934. Its source is *L.* 1934 *c.* 68. Tl New Jersey Turnpike was made available to the public in November 1951. Shortly thereafter plaintiffs inaugurated scheduled or charter service via the New Jersey Turnpike. The Garden State Parkway was made available to the public in August 1954. Several of the plaintiffs have taken advantage of the facilities of the Parkway since that date. All of the plaintiffs have continuously engaged in the said services via the Turnpike and Parkway, as the case may be, since these facilities were made available to them.

On November 14, 1950, by Formal Opinion Number 78, the Attorney General of New Jersey advised the Deputy Director of the New Jersey Division of Taxation, that interstate carriers of persons using the New Jersey Turnpike would not be subject to the tax imposed by *N.J.S.A.* 48:4-20. It was the Attorney General's opinion that the New Jersey Turnpike was not a highway within the meaning of the taxing statute.

On April 18, 1960, the then Attorney General of New Jersey, by Formal Opinion Number 11, advised the Acting Director of the New Jersey Division of Motor Vehicles that *N.J.S.A.* 48:4-20 does apply to interstate busses using the New Jersey Turnpike. This opinion, which reversed Formal Opinion Number 78 (1950), not only dealt with the question of whether or not the New Jersey Turnpike is a highway within the meaning of *N.J.S.A.* 48:4-20, but also with the constitutional questions which would arise out of this application of the excise tax.

Prior to July 25, 1960, the Acting Director of the Division of Motor Vehicles promulgated an order or regulation that the excise tax imposed by *N.J.S.A.* 48:4-20 is applicable to interstate mileage traversed over the New Jersey Turnpike. The plaintiffs were required to pay and have paid under protest since July 25, 1960, excise for the interstate miles traveled by their busses over the New Jersey Turnpike and the Garden State Parkway.

The question of whether or not the Garden State Parkway and the New Jersey Turnpike are "highways" within the meaning and for the purpose subserved by *N.J.S.A.* 48:4-20 must of necessity be answered first. This is due to the fact that if this Court answers the above question in the negative there would be no occasion to examine the constitutional issues which arise out of the present application of the excise tax.

N.J.S.A. 48:4-20 reads as follows:

> Every person owning or operating an autobus which is operated over any highway in this state for the purpose of carrying passengers from a point outside the state to another point outside the state, or from a point outside the state to a point within the state, or from a point within the state to a point outside the state shall pay to the commissioner of motor vehicles, as an excise for the use of such highway, one-half cent for each mile or fraction thereof such autobus shall have been operated over the highways of this

> state, except that no excise shall be payable for the mileage traversed in any municipality to which such owner or operator has paid a monthly franchise tax for the use of its streets under the provisions of section 48:4-14 of this title.

The cardinal guide in the interpretation of a statute is the intention of the Legislature, and that intent so far as possible is to be derived from the language of the statute. *Harvey* v. *Board of Chosen Freeholders of Essex County*, 51 *N.J. Super.* 363 (1958), *aff'd* 30 *N.J.* 381 (1959). The defendants argue that the language of *N.J.S.A.* 48:4-20 is clear and unambiguous and that in such a case there is no room for judicial construction. *cf. Bass* v. *Allen Home Imp. Co.*, 8 N.J. 219 (1951); *Rosenthal* v. *State Employees', etc., System of N.J.*, 30 *N.J. Super.* 136 (*App. Div.* 1954); *Sutherland, Statutory Construction* (*3d ed.* 1943), § 45021.

While defendants premise is true in the ideal situation, it cannot be said to be all inclusive. The following language taken from the late Chief Justice Vanderbilt's opinion in *Watt* v. *Mayor and Council of the Borough of Franklin*, 21 N.J. 274 (1956), is instructive:

> "In every case involving the application of a statute, it is the function of the court to ascertain the intention of the Legislature from the plain meaning of the statute and to apply it to the facts as it finds them, *Carley* v. *Liberty Hat Mfg. Co.*, 81 *N.J.L.* 502, 507. (*E. & A.* 1910). A clear and unambiguous statute is not open to construction or interpretation, and to do so in a case where not required is to do violence to the doctrine of the separation of powers. Such a statute is clear in its meaning and no one need look beyond the literal dictates of the words and phrases used for the true intent and purpose in its creation. But few statutes can boast of such clarity or stand that test through every inquiry, and the court must take the responsibility of determining in such case presented whether the particular statute, in its application to it, is clear and unambiguous.

> The need for construction arises in two instances. As we move away from the ideal of a clear and unambiguous statute we find statutes that on their face are clear and unequivocal but in light of related legislation and of the surrounding facts and circumstances of the case in which it is applicable, the true meaning becomes indefinite or obscure. In these instances it may be the plain meaning of the words themselves that cast doubt as to the true intention of the Legislature, or often it is the absurdity of the result flowing from a literal application of that plain meaning that causes wonder as to the true purpose of the enactment. Then, too, there are those less difficult instances in which the meaning of a statute is obviously obscure or doubtful, where the language used is *per se* capable of dual interpretation. When these circumstances appear the court is not only at liberty to interpret the statute but it is its solemn duty to seek out and give effect to the legislative intent evident from the aids available to it;" (citations omitted) (at *pp.* 277, 278)

The learned Chief Justice went on to ask (at p. 278):

> "When from the plain meaning of the words used in a statute reasonable men are led to question whether the Legislature intended a particular result, can it be said that their enactment is clear and unambiguous?"

In the instant case the facts show that in 1960 the then Attorney General of New Jersey reviewed the statute here being considered and placed an entirely different construction on the language contained therein than that of his learned predecessor. In the ten year period between the Formal Opinions rendered by these learned Attorney Generals not one word of *N.J.S.A.* 48:4-20 had been altered. The fact that completely opposite conclusions with respect to the application of the same statute were reached by two Attorney Generals of this State might be enough to justify this Court's exercise of its interpretative function. There are, however, other factors such as

related statutes and the circumstances which existed at the time *N.J.S.A.* 48:4-20 was enacted which, when taken together, show the need for interpretation.

Applying the principles set forth in *Watt* v. *Mayor and Council of the Borough of Franklin, supra,* to the statute under review, this Court feels justified in exercising its interpretative function with reference to whether the Legislature intended the word highway in *N.J.S.A.* 48:4-20 to be applied in its broad generic sense or in such a manner as to exclude toll roads from its purview.

The word "highway" is of Saxon derivation meaning a right of use for passengers whether private or public. It is a generic name for all kinds of ways which are common to all people having occasion to pass over them. *Parsippany Troy Hills Tp., Morris County* v. *Bowman,* 3 *N.J.* 97 (1949); *Wild* v. *Deig,* 43 *Ind.* 455, 13 *Am. Rep.* 399 *(Sup. Ct.* 1873); *Koutsky* v. *Grabowski,* 150 *Neb.* 508, 34 *N.W. 2d* 893 *(Sup. Ct.* 1948); *Skinner* v. *Town of Weathersfield,* 78 *Vt.* 410, 63 *A.* 142 *(Sup. Ct.* 1906).

There can be no doubt that both the Garden State Parkway and the New Jersey Turnpike are "highways" within the meaning of the word as it is generally used. The statutes under which both projects came into being classify them as such. As to the Garden State Parkway, *N.J.S.A.* 27:12B-2 provides that:

> In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State * * *, the New Jersey Highway Authority (hereinafter created) is hereby authorized and empowered to acquire, construct, maintain, improve, repair and operate highway projects (as hereinafter defined) * * *.

The definition of a "highway project" is found *N.J.S.A.* 27:12B-3(d) to be "* * * any express highway, superhighway of motorway * * *". To the same effect are *N.J.S.A.*

27:23-1 and *N.J.S.A.* 27:23-4 (b) with regard to the New Jersey Turnpike.

The word highway, however, is not always afforded a broad, all inclusive, construction. *cf. Arkansas State Highway Commission* v. *Southwestern Bell Telephone Co.*, ... *Ark.* ...., 178 *S.W. 2d.* 1002 *(Sup. Ct.* 1944) wherein turnpikes were said to be "public highways" but not "highways of the state" within the meaning of an act authorizing the construction of telephone lines along and over the public highways of the state without requiring payment as compensation for exercising that right.

Various reasons are set forth in support of the position that the Legislature could not have intended to include Turnpike and Parkway mileage for the purpose of measuring the excise tax imposed by *N.J.S.A.* 48:4-20. The argument is made that at the time *N.J.S.A.* 48:4-20 was enacted the Turnpike and Parkway were not yet in existence and that therefore the Legislature could not have intended them to be included within the ambit of the tax imposed. It is further asserted that at the time *N.J.S.A.* 48:4-20 was enacted *(L.* 1934 c. 68) there were no toll roads in existence in the State of New Jersey; the last of the toll roads having been purchased by the state in or about the year 1921. In 1931 the Legislature repealed all prior statutes authorizing toll roads or plank roads *(L.* 1931, c. 381).

It is most strongly urged by the plaintiffs that because the responsibility of the State Highway Department is limited solely to free public highways, the excise tax cannot have been intended to apply to mileage traveled over toll roads. *N.J.S.A.* 48:4-23 provides that:

> All moneys derived from the excise hereby imposed shall be paid over monthly by the commissioner of motor vehicles to the state treasurer *and such revenues are hereby appropriated to the state highway commission for use by it for the construction and maintenance of highways.* (emphasis added)

Plaintiffs contend that since the term "highways" as used in *N.J.S.A.* 48:4-23 can only relate to free public highways as opposed to toll roads, it would be unreasonable to place a broader construction on the term "highways" as used in *N.J.S.A.* 48:4-20 in order to justify the inclusion of toll roads some 26 years later. Plaintiffs stress the fact that both of the above sections were enacted at the same time and relate to each other.

An argument which is closely related to the above is that since the Turnpike Authority and the Highway Authority are "independent", "autonomous" bodies which cannot benefit from revenues received by the State, the roads which are operated and maintained by these bodies should not be considered as "highways of the state" within the meaning of the taxing statute.

The defendants, on the other hand, insist that the term "highway" should be understood and applied as it is commonly used, *i.e.*, broad enough to include toll roads. They argue that this was the construction accorded to the term by our courts at a time prior to the repeal of toll roads in this State and that it must be presumed that the Legislature was cognizant of that construction when *N.J.S.A.* 48:4-20 was enacted, and intended to use it in the same sense. *cf River Development Corp.* v. *Liberty Corp.*, 51 *N.J. Super;* 447 (*App. Div.* 1958) *aff'd* 29 *N.J.* 239 (1959).

The defendants point to the early case of *State, Parker, Prosecutor* v. *City of New Brunswick*, 32 *N.J.L.* 548 (*E. & A.* 1867) wherein the court said:

> "Such roads (turnpikes) are public highways. They are established by the sovereign authority of the state for the common benefit, and although the road-bed and the franchise to take tolls are private property, the easement itself is altogether of a public character.
>
> • • • The decision of *Wright* v. *Carter*, 3 *Dutcher* 76, in the Supreme Court of this state, is also founded

on the doctrine that the right of the public in a turnpike subject to the payment of tolls, is identical with the right of the public in a common highway." (at *pp.* 550, 551)

In *Miller* v. *Penna-Reading Seashore Lines Inc.*, 117 *N.J.L.* 152, 154 (*E. & A.* 1936) it was said that "It is well settled that turnpikes constitute public highways." Defendants also rely on *Atlantic & Sub. Ry. Co.* v. *State B'd Assessors*, 80 *N.J.L.* 83 (*Sup. Ct.* 1910) where the court said:

> "For most purposes a turnpike is regarded as a highway; and it may be said to be generally so regarded when the term highway is used in a statute, unless the words and purposes of the act display a different legislative intent." (at *p.* 86)

While it is true that words which have received judicial construction will generally be deemed to have been used by the Legislature in the sense thus ascribed to them, *River Development Corp.* v. *Liberty Corp.*, *supra*, this rule may be inapplicable where the statutes are not in *pari materia*, or where it is apparent that special reasons exist for treating the words in another fashion.

The cases relied on by the defendants to show the prior judicial construction given to the word "highway", did not involve issues similar to the case at bar. Further, the legislation involved in two of the cases cited are not in *pari materia* with *N.J.S.A.* 48:4-20. *State, Parker, Prosecutor* v. *City of New Brunswick*, *supra*, involved the question of whether or not a provision in a municipal charter gave local authorities the right to grade and pave a turnpike road lying within the city limits. The court held that the turnpike was a *public street* and as such was subject to city legislation.

In *Atlantic & Sub. Ry. Co.* v. *State B'd Assessors*, *supra*, it was held that within the meaning of the act of

1906 (*L.* 1906 *c.* 290) providing for the taxation of the franchises of street railway corporations occupying public streets, highways, roads, lanes and other public places a turnpike is *a public place.*

The third case, *Miller* v. *Penna Reading Seashore Lines, Inc., supra,* was a negligence action wherein a small boy fell against an electrified third rail while crossing the tracks of the defendant company at a turnpike crossing. The Court of Errors and Appeals had before it only the question of the propriety of the trial judge's directed verdict in favor of the defendant. It held that a directed verdict based on the fact that the railroad was the owner of the *locus in quo* and the plaintiff a trespasser, was error. The court reasoned that part of the *locus in quo* seemed to be part of a *public highway* and that a jury question had been presented on that issue.

It can be seen that in the above cases the courts were concerned with the "public" character of turnpikes generally. This Court would have no difficulty in holding that the right of the public to travel the Garden State Parkway and the New Jersey Turnpike, subject to the payment of tolls and compliance with reasonable rules and regulations, is identical with the right of the public in a "common" or "free" highway. *cf. Fenton* v. *Margate Bridge Co.,* 24 *N.J. Super.* 450 *(App. Div.) cert. den.* 12 *N.J.* 350 (1953). In this sense at least, toll roads are "public" in character. However, the immediate issue presented in the case at bar is not to what degree the toll roads in question are subject to the rights of the public, nor is it to what extent municipalities may pave and grade turnpike roads which lie within city limits. The issue here is whether the Legislature, at the time is enacted *N.J.S.A.* 48:4-20, intended the word "highway" as used therein to be understood and applied in its broad general sense or in a more restricted sense such as that urged by the plaintiffs.

There being no prior judicial construction which is of aid, the Court must look elsewhere for guidance. The plaintiffs quite correctly argue that the circumstances which existed at the time the statute was enacted should be examined. Legislative intent generally is determined as of the date of the statute's enactment. However, a broader meaning may be given to legislative enactments where circumstances were non-existent at the time the particular statute was passed. *cf. State* v. *Struck*, 44 *N.J. Super.* 274 *(City. Ct.* 1957). It would therefore be incorrect to say that merely because there were no toll roads in existence in 1934, the term "highway" as used in 1934 could not be broad enough to include toll roads. There are, however, other circumstances which prevent the application of the broad rule set out above.

I. The early public policy of this State to make all roads free for public use as shown by a consistent course of legislation prior to the enactment of the statute under review makes it unlikely that the Legislature intended the word "highway" as used therein to include toll roads.

The public policy of New Jersey, as evidenced by a consistent course of legislation on a given subject matter, may be invoked to assist in ascertaining the legislative intent. *River Development Corp.* v. *Liberty Corp.*, 51 *N.J. Super.* 447 *(App. Div.* 1958), *Conover* v. *Public Service Ry. Co.*, 80 *N.J.L.* 681 *(Sup. Ct.* 1910).

The taxing statute here being considered, *N.J.S.A.* 48:4-20, was enacted in 1934 *(L.* 1934, *c.* 68). It was described by the Legislature as a supplement to *L.* 1916, *c.* 136 as amended. *L.* 1916, *c.* 136 *(N.J.S.A.* 48:4-14) is a franchise tax which is imposed upon every person operating an autobus in any municipality of this State.

N.J.S.A. 48:4-20 is not only a supplement to *L.* 1916, *c.* 136 but is an amplification of *L.* 1930, *c.* 223 which repealed *L.* 1927, *c.* 184. Both *L.* 1930, *c.* 223 and *L.* 1927,

c. 184 were earlier versions of the excise tax here being construed. In both, it was provided that an excise tax be paid for interstate mileage traveled over any "highway of this state." At the time each of the two statutes were enacted, the legislation providing for toll roads had not as yet been repealed, *L.* 1931 *c.* 381.

At a much earlier date however, the legislature had set the wheels in motion toward the eventual goal of bringing all toll roads under governmental ownership, thereby making them free for public use. As these earlier legislative enactments show, the State found that toll roads were becoming burdensome. This was due to the fact that certain of the toll road companies were not properly maintaining the roads, thereby allowing them to fall into disrepair.

As early as 1882 a statute was enacted which provided that if a turnpike company did not keep its road in good repair after being notified by a complaint signed by 10 freeholders, it could not exact tolls on that particular road until the repairs were made. *L.* 1882, *c.* 26. Such statutes as *L.* 1878, *c.* 58 provided for the purchase of toll roads which had fallen into disrepair. *cf. L.* 1886, *c.* 277 "An Act to provide for the purchase of turnpike and macadamized toll roads."

In 1897 the Legislature evolved a plan which speeded up governmental acquisition of privately owned toll roads. The State offered to pay 33⅓ percent of the cost of acquiring a toll road if the adjacent land owners would pay 10 percent and the county the remaining 56⅔ percent. It is interesting to note that this statute was entitled "An Act to provide for the acquirement of turnpike roads for free public use." *L.* 1897, *c.* 191. A similar act was passed in 1901 which not only provided for the acquisition of toll roads "for free public use" but also provided for the "permanent improvement and maintenance of the same." *L.* 1901, *c.* 132.

By 1905 a statute was enacted which provided that the board of freeholders of any county, with the written approval of the state commissioner of public roads and the agreement of the toll road owner, could purchase any toll roads or turnpikes lying within the respective county which had theretofore been improved and which was not less than one mile in length. Any toll road so purchased was to become "a county road" and was to be "cared for, repaired, improved and maintained for free public use in the manner that other county roads are cared for, repaired, improved and maintained." *L.* 1905, *c.* 173.

In 1908 and 1909 statutes were enacted which provided that county boards of freeholders could issue and sell bonds in order to raise money to purchase or condemn, and thereafter to improve, toll or turnpike roads. *L.* 1908, *c.* 13 and *L.* 1909, *c.* 102. As a result of all of the statutes set out above, the last toll or turnpike road became "free for public use" in or shortly after 1921.

In light of this early policy to make all roads free for public use, it is unlikely that the Legislature in 1927, when the first excise tax was enacted, intended to include toll roads within the meaning of the word "highway" as used therein. *L.* 1927, *c.* 184. The later statute *L.* 1930, *c.* 223 and the present statute *L.* 1934, *c.* 68, do not indicate in any way that the word "highway" as there used is to be accorded a different meaning than that intended by the Legislature in the excise tax of 1927. The fact that the Legislature did not repeal all statutes relating to toll or turnpike roads until 1931 does not detract from the above position. *L.* 1931, *c.* 381.

II. The word "highway" as it is used in *N.J.S.A.* 48:4-20 should be afforded the same restricted meaning as must be given to the word "highway" in *N.J.S.A.* 48:4-23 and in *N.J.S.A.* 48:4-32.

It is a general rule of construction that where a word or a phrase occurs more than once in a statute it should

have the same meaning throughout unless there is a clear indication to the contrary. *Clifton* v. *Zweir*, 36 *N.J.* 309 (1962); *Ford Motor Co.* v. *New Jersey Dept. of Labor & Industry, Division of Employment Sec., Bd. of Review*, 7 *N.J. Super.* 30 *(App. Div.), aff'd* 5 *N.J.* 494 (1950). Put more strongly, there is a presumption that a word or phrase is used in the same sense throughout a statute. *DeFlesco* v. *Mercer County Board of Elections*, 43 *N.J. Super.* 492 *(App. Div.* 1957). In *Harper* v. *New Jersey Mfrs. Cas. Inc. Co.*, 1 *N.J.* 93, the court said:

> "It is an elementary rule in aid of interpretation that, barring differentiation in the context, where the same word or phrase is used more than once in a statute in relation to the same subject matter, and in one connection its meaning is clear and in another it is doubtful or obscure, it is in the latter case given the same construction as in the former." (citations omitted) (at *p.* 101)

The forerunner of the present autobus excise tax was entitled "An Act to provide for the laying of an excise on the use of highways of this State by motor vehicles operated for the purpose of carrying passengers or property for hire in interstate commerce." *L.* 1927, *c.* 184. This tax applied to all common carriers of persons or property for hire excepting only those vehicles, locomotives or cars operated on rails or through the use of wires and trolleys. Section 3 of the act provided that:

> All monies derived from the excise hereby imposed shall be turned over monthly to the Treasurer of the State, and such revenues are hereby appropriated to the State Highway Commission for the use by it for the construction and maintenance of State highways.

The penalty imposed for failure to comply with this act was the suspension of motor vehicle registrations.

The next version of the present excise tax was *L.* 1930, *c.* 223 which was entitled "A Supplement to an 'Act con-

cerning autobusses and their operation", approved March seventeenth, one thousand nine hundred and sixteen". Section 5 of this act repealed *L.* 1927, *c.* 184 and made the excise tax applicable solely to auto busses. Sec. 2 of this act provided that all moneys derived from the tax were to be used for "the construction and maintenance of highways." Sec. 4 of this statute made the penalty for failure to comply with its provisions the payment of a fine. The monies derived from the collection of fines were "appropriated to the State Highway Commission for use by it for the construction and maintenance of highways."

The present statute, *L.* 1934, *c.* 68, makes the tax applicable to autobusses only (Sec. 1), directs that the monies derived therefrom be used for the construction and maintenance of highways (Sec. 4), and directs that collected fines be appropriated for the use of the State Highway Commission for the construction and maintenance of highways (Sec. 13).

To the extent that each of the above statutes directs that the collected tax and fines be appropriated for "highway" construction and maintenance, the word "highway" must be understood in a restricted sense so as to exclude toll roads. The Legislature could not have intended the word to be broad enough to include privately operated toll roads since it would have been unconstitutional for the State Highway Commission to spend money to improve or construct roads for private toll road companies. *N.J. Const.* 1844, *Art.* I, *Sec.* 20 (as amended 1875) proclaimed that:

> No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever.

The giving of public funds or property to a private corporation has been held to be unconstitutional whether

made directly or indirectly *cf. Wilentz* v. *Hendrickson*, 133 *N.J. Eq.* 447 *(Ch.* 1943), *aff'd* 135 *N.J. Eq.* 244 *(E. & A.* 1944); *In Re Voorhees*, 123 *N.J. Eq.* 142 *(Ch.* 1938), *aff'd* 124 *N.J.L.* 35 *(E. & A.* 1939).

Toll road companies were solely responsible for the repair, maintenance and construction of their roads. It was pointed out earlier in this Opinion that statutes were enacted which provided penalties to be imposed upon those toll road companies which allowed their roads to fall into disrepair. Later statutes made governmental supervision and control of the repair and maintenance of toll roads applicable only after a privately owned toll road had been abandoned or had been acquired by the State or one of its political subdivisions. The State Highway Commission and its successor, the State Highway Department, have never been authorized or directed by the Legislature to construct or maintain toll roads.

While a direct legislative appropriation to the New Jersey Turnpike or the Garden State Parkway might not be unconstitutional, any diversion to either of these expressways of funds appropriated for Highway Department use would be unlawful. In *New Jersey Turnpike Authority* v. *Parsons*, 3 *N.J.* 235 (1949) the court said:

> "Nor has the State Highway Commissioner the right to divert funds appropriated to the State Highway Department or to render services for a project that is not within the scope of the duties confided to his Department. Whatever engineering or related services he may have supplied cannot conceivably relate to the work of his Department. *The contemplated turnpike will cost so many times his total annual appropriation that it could not possibly be a project of his Department.*" (emphasis added) (at *p.* 247)

Further, for the State Highway Department to make expenditures out of its own funds for the benefit of a

public corporation such as the Turnpike Authority would be to ignore *N.J. Const.* 1947, *Art.* VIII, *Sec.* 2, *par.* 2 which provides that "no money shall be drawn from the State treasury but from appropriations made by law." *cf. New Jersey Turnpike Authority* v. *Parsons, supra.*

While the word "highway" is often used in a broad, general manner, the meaning of such general words will be restricted whenever this is necessary to carry out the legislative intention. *DeFazio* v. *Haven Savings & Loan Ass'n.*, 22 *N.J.* 511 (1956). It becomes necessary in order to sustain the validity of the taxing statute to restrict the meaning of the word "highway" in those sections which relate to the disposition to be made of collected taxes and fines, to include only those toll free highways within the jurisdiction of the State Highway Department. Following the general rule that courts should presume that the legislature intends a word to be given the same meaning throughout a statute, plus the fact that better reasoning and the spirit of the statute seem to demand such a result, it is the opinion of this Court that the word "highway" as used in *N.J.S.A.* 48:4-20 is restricted so as to exclude from its purview any road not within the jurisdiction of the State Highway Department. The New Jersey Turnpike and the Garden State Parkway not being within the jurisdiction and control of the State Highway Department, are not "highways" within the meaning of the word as it is used in *N.J.S.A.* 48:4-20.

> III. The tax statute here being reviewed was intended to compensate the State of New Jersey for the financial burden imposed upon it due to the maintenance and construction of its highways. Use of the New Jersey Turnpike and the Garden State Parkway imposes no financial burden on the State.

The New Jersey Turnpike and the Garden State Parkway were designed to be, and are, completely self-sustain

ing. State aid is specifically denied in the statutes creating both Authorities. *N.J.S.A.* 27:23-1; *N.J.S.A.* 27:12B-5.

That both Authorities are completely autonomous was shown by evidence introduced at the trial of this case. It was shown by plaintiffs that both Authorities transact business at arms length with the several departments of the State. Land has been sold to the Highway Department, the Fish and Game Commission, and the Motor Vehicle Department at prices indicative of market values (Tr. 121, 125, 129). The State is reimbursed for all direct costs of policing the Turnpike and Parkway including the cost of training state troopers. It was shown that for the year ending December 31, 1961, the Turnpike Authority alone paid to the State $1,161,947.00 for traffic control and police expenditures. Both Authorities maintain their own wrecking services, ambulances and fire equipment. Further, and what is more important, with the exception of three toll free sections of the Garden State Parkway which are under the exclusive jurisdiction of the State Highway Department (Tr. 196, 226, 227), the cost of maintenance and construction is borne solely by the Turnpike and Highway Authorities. The Turnpike Authority's 1961 Annual Report showed in the Statement of Revenues and Operating Expenses Year Ended December 31, 1961 that $2,960,683.00 had been spent for maintenance, repair, replacement and reconstruction. Any incidental expenses which may be borne by the State are not such as would necessitate a finding that the State is burdened financially by Turnpike and Parkway operations. Proof of this position lies in the fact that the State, through its various departments, has never rendered any bills to the Authorities for "incidental" expenses which it might incur. The position taken by the defendants that because of Turnpike and Parkway operations, the State of New Jersey sustains an increased financial burden which necessitates, or rather supports, a holding that the excise tax was in-

tended to include independently operated toll roads is without merit.

It is important at this time to note that the Formal Opinion of Attorney General Parsons (78 Op. Att'y Gen. (1950) which held that *N.J.S.A.* 48:4-20 did not apply to Turnpike mileage was based on the theory set forth in this argument. This opinion was followed for 10 years until being "overruled" by 11 Op. Att'y Gen. (1960). While not binding on the courts, uniform administrative interpretation of a statute over a considerable length of time will be afforded respect and will not be lightly disregarded. *cf. In re Borough of Glen Rock*, 25 *N.J.* 241 (1957), *Newberry* v. *Neeld*, 46 *N.J. Super.* 216 *(App. Div.) cert. den.* 25 *N.J.* 132 (1957).

The "overruling" opinion (11 Op. Att'y Gen. (1960)) was primarily aimed at the constitutional questions which arise from the present application of the excise tax. It was said therein that the former opinion (78 Op. Att'y Gen. (1950)) was probably influenced by early decisions of the United States Supreme Court in that area of constitutional law relative to interstate commerce. There is no basis for such a probability as interstate commerce and the Constitution were never mentioned in Attorney General Parsons' 1950 Opinion. It was Attorney General Parsons' opinion that " • • • any such turnpike project constructed pursuant to such act (Turnpike Authority Act of 1948) is not a highway within the intendment of *R.S.* 48:4-20." The Attorney General's opinion of 1960 met this argument by taking the position that early decisions of the New Jersey courts have held turnpikes to be "public highways" within the meaning of that phrase as it is customarily used in the statutes of this State. Citing *Miller* v. *Penna-Reading Seashore Lines, supra; Atlantic & Sub. Ry Co.* v. *State B'd Assessors, supra; State, Parker* v. *City of New Brunswick, supra*, and *Fenton* v. *Margate Bridge Co.*, 24 *N.J. Super.* 450 *(App. Div.* 1953). This

Court has already given its reasons why this position is untenable. (See *pp.* 9, 10, 11 of this Opinion).

The excise tax being of a compensatory nature, the Legislature could not have intended to include within the ambit of the tax, mileage traveled over the New Jersey Turnpike or the Garden State Parkway due to the fact that tolls paid by the users of these expressways obviate the necessity for the State to seek compensation.

IV. The New Jersey Turnpike Authority and The New Jersey Highway Authority are in but not of the Highway Department. As such, they are independent corporate entities whose roads are not "highways of this state" within the meaning of *N.J.S.A.* 48:4-20.

This Court is aware of and respects, but in relation to the issue here being decided, is in no wise bound by the decisions of Pennsylvania Supreme Court in *Transamerican Freight Lines, Inc.* v. *Commonwealth of Pennsylvania*, 396 *Pa.* 64, 151 *A.2d* 630 *(Sup. Ct.* 1959), *cert. den.* 361 *U.S.* 882 (1959), and *Shirks Motor Exp. Corp.* v. *Messner*, 375 *Pa.* 450, 100 *A.2d* 913 *(Sup. Ct.* 1953) appeal dismissed for lack of a substantial federal question, *sub nom Interstate Motor Freight System* v. *Messner*, 347 *U.S.* 941 (1954). In the Shirks case it was held that the imposition of tolls plus the Pennsylvania gross receipts tax upon users of the Pennsylvania Turnpike was not unconstitutional. Since the court decided the case on the question of the constitutionality of the gross receipts tax as applied to interstate users of the Pennsylvania Turnpike it cannot be authority for the exact point here being decided. In the *Transamerican case*, however, in addition to disposing of the constitutional question of the application of the gross receipts tax to interstate users of the Pennsylvania Turnpike, the court held that the Pennsylvania Turnpike is a state highway within the meaning of the Pennsylvania gross receipts tax. The Supreme Court, in affirming the decision of the Dauphin County Court of Common

Pleas, quoted from Judge Neeley's opinion wherein it was said:

> "The appellant contends that the Turnpike mileage should not be used in the taxing formula because the Turnpike is not a State highway. This contention is without merit.
>
> *An examination of the applicable statute and its supplements indicates that it was intended by the Legislature that the Turnpike should become part of our State highway system. This purpose is clearly revealed in the title of the original Act of May 21, 1937* • • •
>
> We believe that the statutes, *inter alia*, provide that the Pennsylvania Turnpike Commission is an instrumentality of the Commonwealth which fulfills an essential governmental function and possesses the power to issue bonds of the Commonwealth; *that the Turnpike is to be maintained and repaired through the Department of Highways;* and further when all bonds have been paid the Turnpike is to become part of the system of State Highways and be maintained by the Department of Highways free of all tolls." (emphasis added) (151 *A.2d* at *pp.* 633, 634)

While the New Jersey Turnpike Authority and the New Jersey Highway Authority are public corporations, they are independent, autonomous corporate entities whose roads are not a part of the State highway system. In *New Jersey Highway Authority* v. *Parsons*, *supra*, the court said:

> "Though created by the State and subject to dissolution by the State, they (public corporations) are in the eyes of the law independent entities and the State is not responsible for their debts and liabilities, whether they be municipal corporations or counties or such specialized bodies as the Port of New York Authority; *cf California Toll Bridge Authority* v. *Wentworth*, 212 *Cal.* 298, 298 *Pac.* 485 (1931).
>
> • • • It is also objected that the Turnpike Authority is the *alter ego* of the State and not a self sufficient

public corporation because it is a body corporate and politic "in the State Highway Department." *R.S.* 27: 23-3. This statutory provision is manifestly intended to be a compliance with the constitutional provision requiring that "all executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments," *Article V, Section IV, paragraph 1.* But the State Highway Commissioner is given no authority whatsoever over the Turnpike Authority. *The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any the less an independent entity, as the language of the entire Act clearly demonstrates.* (3 *N.J.* at *pp.* 243, 244) (emphasis added)

The Court also said (at *p.* 247), "The Turnpike Authority cannot blow hot and cold in the same breath; it either is an autonomous corporation or it is not."

The Garden State Parkway and the New Jersey Turnpike must be viewed then, as the roads of independent, autonomous corporation, to wit: the N. J. Turnpike Authority and the New Jersey Highway Authority. As such they occupy, and will so occupy until such time as they are turned over to the New Jersey Highway Department and are made free for public use, a status not unlike the roads owned and operated by the old privately owned toll road companies. It has been shown earlier in this Opinion that the Legislature, at the time *N.J.S.A.* 48:4-20 was enacted, could not have intended to include this type of road within the ambit of the tax imposed pursuant to *N.J.S.A.* 48:4-20.

While a state might have the right, with reference to a given subject matter, to tax its subjects or those who use its facilities, statutes of a tax nature must be treated with caution by our courts lest in our zeal to benefit the

State we may overlook the well being of the people. This view is in harmony with the general rules that ambiguities in legislation of a tax nature must be strictly construed against the taxing power and in favor of the taxpayer. *cf. Harper* v. *New Jersey Mtrs. Cas. Ins. Co.*, 1 *N.J.* 93 (1948).

For the reasons given in the body of this Opinion, it is the holding of this Court that the New Jersey Turnpike and the Garden State Parkway are not "highways" within the meaning of *N.J.S.A.* 48:4-20. The defendants are henceforth enjoined from enforcing *N.J.S.A.* 48:4-20 with respect to interstate mileage traveled on the New Jersey Turnpike and the Garden State Parkway and are ordered to refund all sums paid by the plaintiffs under *N.J.S.A.* 48:4-20 on account of interstate mileage traversed over the New Jersey Turnpike and Garden State Parkway since June 1, 1960.

An appropriate order may be submitted.

/s/
JAMES R. GIULIANO, J.S.C.

41 N.J. 467, 197 A. 2d 366

SUPREME COURT OF NEW JERSEY
A-42 September Term 1963.

Argued Decided

Mr. Alan B. Handler, Deputy Attorney General, argued the cause for the Defendants-Appellants and Cross-Respondents. (*Mr. Arthur J. Sills*, Attorney General of New Jersey; *Mr. Alan B. Handler*, on the brief.)

Mr. Merritt Lane, Jr. argued the cause for the Plaintiff-Respondent and Cross-Appellant, The Greyhound Corporation. (*Mrs. McCarter & English*, attorneys; *Mr. Ross B. Abrash*, on the brief.)

Mr. William A. Roberts, of the District of Columbia Bar, argued the cause for the Plaintiff-Respondent and Cross-Appellant, Safeway Trails, Inc., etc. (*Messrs. Harrison and Jacobs*, attorneys; *Messrs. Roberts & McInnis*, of the District of Columbia Bar, of counsel and on the brief; *Mr. George M. Eichler*, joining in the brief.)

Mr. George M. Eichler argued the cause for the Plaintiffs-Respondents and Cross-Appellants, Lincoln Transit Co., Inc., etc., et al.

The opinion of the court was delivered by

PROCTOR, *J.*

This appeal consists of three consolidated actions involving the interpretation and validity of the Interstate Busses Excise Tax, *N.J.S.A.* 48:4-20. The question raised is whether the statute which imposes an excise tax of ½ cent per mile on interstate autobuses operated over the highways of this State applies to mileage traveled over the New Jersey Turnpike and Garden State Parkway, and if so, whether the statute as applied violates the Commerce Clause of the Federal Constitution and the Equal Protection Clause of the Fourteenth Amendment.

Lincoln Transit Co. and other autobus companies filed a petition for a declaratory judgment in the Superior Court, Appellate Division, against Ned J. Parsekian, Acting Director, Division of Motor Vehicles, Department of Law and Public Safety of the State of New Jersey. Safeway Trails, Inc., filed a complaint in lieu of prerogative writ in the Superior Court, Law Division, against David D. Furman, Attorney General of the State of New Jersey, Parsekian, and John A. Kervick, State Treasurer of New Jersey. Greyhound Corporation filed a complaint for injunctive relief and a declaratory judgment in the Superior Court, Chancery Division, against Kervick and Parsekian. The Appellate Division ordered that these three actions, in which basically the same relief was being sought, be consolidated and transferred to the Superior Court, Law Division, for trial.

Following trial the Law Division held that the New Jersey Turnpike and Garden State Parkway were not highways within the meaning and intendment of *N.J.S.A.* 48:4-20 and that the highway-use tax imposed by the statute was improperly applied to and collected from the plaintiffs for mileage traveled over those roads and should be refunded. Defendants were enjoined and restrained from enforcing the tax with respect to mileage traveled by interstate autobuses over the New Jersey Turnpike and Garden State Parkway. *Safeway Trails Inc.* v. *Furman*, 76 *N. J. Super.* 90 (*Law Div.* 1962). The Court later held that plaintiffs were not entitled to interest upon the refund of the tax monies. *Safeway Trails* v. *Furman*, 77 *N. J. Super.* 26 (*Law Div.* 1962). Defendants appealed from the judgment below, and the plaintiffs filed joint cross-appeals from that portion of the judgment which denied interest on the tax refunds.

The plaintiffs, common carriers of passengers, operate their autobuses over the highways of this State on both intrastate and interstate journeys. They travel extensively

over either the New Jersey Turnpike or the Garden State Parkway. As interstate autobus operators plaintiffs are subject to the provisions of *N.J.S.A.* 48:4-20 which, prior to amendment in December 1962,* provided:

> "Every person owning or operating an autobus which is operated over any highway in this state for the purpose of carrying passengers from a point outside the state to another point outside the state, or from a point outside the state to a point within the state, or from a point within the state to a point outside the state shall pay to the commissioner of motor vehicles, as an excise for the use of such highway one-half cent for each mile or fraction thereof such autobus shall have been operated over the highways of this state, except that no excise shall be payable for the mileage traversed in any municipality to which such owner or operator has paid a monthly franchise tax for the use of its streets under the provisions of section 48:4-14 of this title."

N.J.S.A. 48:4-20 has been in effect since May 7, 1934. *L.* 1934, *c.* 68.

The Legislature by the New Jersey Turnpike Authority Act (*L.* 1948, *c.* 454, as amended and supplemented by *L.* 1949, *cc.* 40 and 41; *N.J.S.A.* 27:23-1 *et. seq.*) provided for the creation of the Turnpike which became available to the public in the latter part of 1951. The Garden State Parkway was established pursuant to the New Jersey Highway Authority Act (*L.* 1952, *c.* 16; *N.J.S.A.* 27:12B-1 *et seq.*) and became available in the summer of 1954. Both projects were authorized "in order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known safety device including center divisions, ample

*The amendment was administrative only, substituting "Director of the Division of Motor Vehicles" for "commissioner of motor vehicles."

shoulder widths, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads. . . ." *N.J.S.A.* 27:23-1; *N.J.S.A.* 27:12B-2. In short, the statutes contemplated the creation of express highways superior to existing roads which would provide safer, faster, and more convenient travel in and through the State.

The New Jersey Turnpike and the Garden State Parkway were constructed by and are operated and controlled by the New Jersey Turnpike Authority and the New Jersey Highway Authority, respectively, in accordance with the authorizing legislation. Each authority was established in the State Highway Department as a body corporate and politic and each constitutes "an instrumentality exercising public and essential governmental functions," whose activities in the exercise of its authority "shall be deemed and held to be an essential governmental function of the State." *N.J.S.A.* 27:23-3; *N.J.S.A.* 27:12B-4. Each authority is comprised of three members appointed by the Governor with the advice and consent of the Senate.

The statutes creating these Authorities provide for the sale to the public of the Authorities' bonds to finance the construction of the projects. The statutes authorize the Authorities to fix and collect tolls and other charges for the use of such projects. The operations of both Authorities are designed to be financially self-liquidating. The statute contemplates that upon payment of all bonds and notes, the Turnpike shall become part of the State Highway Department, to be operated free of tolls. *N.J.S.A.* 27:23-16. The State has guaranteed the punctual payment of the Highway Authority (Parkway) bonds and has provided for the funding of this guarantee. This Court has recognized that the property and roads of the Highway Authority are held for the State. *Berke* v. *N. J. Highway Authority*, 13 *N.J.* 14, 29 (1953).

Ibid.

In 1950 in response to a request from the Division of Taxation, the then Attorney General issued Formal Opinion No. 78-1950 in which he advised that interstate autobus operators would not be subject to the ½ cent a mile tax provided by *N.J.S.A.* 48:4-20 for mileage traveled on the Turnpike. In his view the excise tax was intended to compensate the public for the cost and construction of public roads; the Turnpike Authority Act provided its own means of financing all expenses of the project; and therefore the Turnpike project was not a "highway" within the intendment of *N.J.S.A.* 48:4-20. In accordance with this opinion, no excise taxes were levied on mileage traveled by interstate autobuses over the Turnpike, and later for similar reasons, the Parkway. In 1960, however, Attorney General Furman issued Formal Opinion No. 11-1960 in which he determined that the New Jersey Turnpike was a "highway" for the purpose of *N.J.S.A.* 48:4-20 and that the application of the highway excise tax to interstate buses using the Turnpike would not be violative of constitutional guarantees. Pursuant to this ruling, the Acting Director of the Division of Motor Vehicles on June 1, 1960, notified interstate autobuses using the Turnpike and Parkway that they would be required to report such mileage to the Division of Motor Vehicles and would be required to pay a tax on such mileage under *N.J.S.A.* 48:4-20. The plaintiffs have complied with this notification and have paid the tax imposed under protest.

Two questions are presented on this appeal: First, whether mileage traveled over the New Jersey Turnpike and Garden State Parkway by interstate autobuses should be included in the computation of the excise tax imposed by *N.J.S.A.* 48:4-20 and second, if so, whether the imposition of the tax violates the Commerce Clause of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

I

Generally, our duty in construing a statute is to determine the intention of the Legislature. It is apparent that in 1934 when *N.J.S.A.* 48:4-20 was enacted, turnpikes and parkways of the type authorized by the Legislature under the Turnpike Authority Act and Highway Authority Act, if not unknown to the legislators, were certainly not within their specific contemplation. However, it is an established rule of statutory construction that a statute written in general terms will be given prospective application to situations unknown or nonexistent at the time of its enactment which are within its general purview and scope where the language fairly includes them. *Cain* v. *Bowlby*, 114 *F. 2d.* 519 (10th *Cir.* 1940); *State* v. *Struck*, 44 *N.J. Super.* 274, 278 (*Cty Ct.* 1957); 2 Sutherland, *Statutory Construction* § 5102, p. 503 (1943).

Certainly the statutory language "any highway in this state" is broad enough to include within its general and ordinary meaning the New Jersey Turnpike and the Garden State Parkway.* Indeed, the legislation providing for their construction refers to them as "modern express highways." *N.J.S.A.* 27:23-1, 27:12B-2, quoted *supra*. And as stated in *Atlantic Sub. Ry. Co.* v. *State B'd. Assessors*, 80 *N.J.L.* 83, 86 (*Sup. Ct.* 1910), "For most purposes a turnpike is regarded as a highway; and it may be said to be generally so regarded when the term highway is used in a statute, unless the words and purposes of the act display a different legislative intent." See also *Miller* v. *Penna. Reading Seashore Lines, Inc.*, 117 *N.J.L.* 152 (*E. & A.* 1936); *State, Parker* v. *City of New Brunswick*, 32 *N.J.L.* 548 (*E. & A.* 1867);

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*Webster's New International Dictionary, 2*d ed.* (1959) defines "highway" as:

1. A main road or thoroughfare; hence, a road or way open to the use of the public, including in the broadest sense of the term ways upon water as well as upon land. * * * Syn.—Road, path, course. See way.

Fenton v. Margate Bridge Co., 24 *N.J. Super.* 450 (*App. Div.* 1953), *certif. denied*, 12 *N.J.* 350 (1953). In the absence of an explicit indication of a special meaning, the words of a statute are to be given their ordinary and well understood meaning. *Ford Motor Company v. N. J. Dept. of Labor & Industry*, 5, *N.J.* 494, 503 (1950); *Morris & Essex Invest. Co. v. Director of Div. of Taxation*, 33 *N.J.* 24, 34 (1960). Accordingly, we should construe the term "any highway" in *N.J.S.A.* 48:4-20 to include the Turnpike and the Parkway unless the purpose and general purview of the enactment compel a more restrictive meaning.

The forerunner of the present tax provision was enacted in 1927 (*L.* 1927, *c.* 184) and was accompanied by the following statement of purpose:

> "This bill imposes an excise on the use of highways of the State by motor vehicles used for carrying passengers or property for hire in interstate commerce. The purpose is to compel such vehicles to bear their just share of taxation. At the present time such vehicles pay nothing to the State of New Jersey, except the registration fees provided for under the Motor Vehicle Act, while other vehicles operating wholly within the State are subject to taxation. The right to impose such a tax on such vehicles engaged in interstate commerce has been recently upheld by the Federal courts."

It is apparent that the purpose of the statute was to require interstate autobuses to pay their fair share of taxation, and that a tax was to be levied on the privilege of using the highways in the State in order to compensate the State in part for the costs of constructing and maintaining its network of highways and of administering road laws. See *Interstate Busses Corp. v. Blodgett*, 19 *F.* 2*d* 256 (*D.C. Conn.* 1927) *aff'd* 276 *U.S.* 245, 72 *L. ed.* 551 (1928).

The trial court stated that the excise tax was of a compensatory nature and concluded therefrom that the Legislature could not have intended to include within the scope of *N.J.S.A.* 48:4-20 mileage traveled over the Turnpike and

Parkway "due to the fact that tolls paid by the users of these expressways obviate the necessity for the State to seek compensation." 76 *N.J. Super.* at 111. We think the trial court misconceived the purpose and general purview of the statute.

We agree that the Legislature intended the tax to be compensatory for costs incurred by the State when its roads were used by interstate buses. However, we believe it was intended to be compensatory in a broad and general sense since the tax is imposed at a flat rate of ½ cent per mile traveled on *any* highway in the State. Clearly, it was not anticipated that ½ cent would compensate the State for each particular mile traveled, regardless of the type of road used. The cost to the State of constructing and maintaining its roads and of regulating traffic thereon varies considerably from road to road, depending on the type of construction and improvement costs, and numerous other factors. Compare the cost to the State of constructing and maintaining an elevated express highway in a highly developed urban area, such as the Pulaski Skyway, with the cost of a highway running through open country. Clearly the ½ cent tax applies alike to mileage traveled on either road. It is therefore clear that the mileage formula adopted by the Legislature, as any tax formula, was but an averaging device intended to result in fair compensation for the average trip by the average interstate user over an average-cost road. And since the average trip would utilize both low-cost and high-cost roads, the formula to that extent would be a suitable measure for the imposition of the tax. Any measure adopted by the Legislature for the imposition of a tax for the privilege of road use can, because of administrative difficulties, be compensatory only in a broad and general sense. For this reason taxes measured by horsepower, tonnage capacity or chassis weight, singly or in combination, or even flat fees paid annually, have been upheld as reasonable measures of the privilege granted. See *Capitol Greyhound Lines* v. *Brice*, 339 *U.S.* 542, 544, 94

L. ed. 1053, 1056, (1950); *Kane* v. *New Jersey* 242 *U.S.* 160, 168, 61 *L. ed.* 22, 227 (1916). The tax calculated at the rate of ½ cent a mile is intended to compensate the State for providing a complete network of highways and is not intended as a charge for the actual use of a particular highway. In short, the statute does not intend to collect a "rent" for the use of a particular road but establishes a reasonable measure of an interstate autobus's fair share of taxation for the use of New Jersey roads.

If we were determined that mileage traveled by interstate autobuses on the Turnpike and Parkway should be excluded from the tax base, we would thereby upset the measure of the tax established by the Legislature. As the evidence before us indicates, roads maintained by the Highway Department in the vicinity of these toll roads have become high-cost roads because of increased traffic thereon generated by users of these toll roads. It cannot be denied that the State, its counties, and municipalities have had to meet increased burdens in the construction, maintainance, improvement, and policing of roads as a result of the creation and use of the Turnpike and Parkway. Accordingly, a tax of ½ cent per mile on these high-cost subsidiary roads, if an exemption were to be granted for toll-road mileage, would not compensate the State in accordance with the legislative purpose.

We should avoid any interpretation of the statute which would cripple the mileage formula and destroy its usefulness as an averaging device. Therefore, to comport with the express legislative purpose that interstate autobuses shall bear their fair share of taxation, it is necessary to conclude that mileage traveled on the Turnpike and Parkway should be included in computing the tax imposed under *N.J.S.A.* 48:4-20.

Moreover, the trial court's conclusion that the charging of tolls obviates the necessity for the State to seek compensation does not seem warranted by the evidence. Although

the Turnpike and Parkway reimburse the State for the costs of providing State Police on these toll roads, the State incurs not only the road costs discussed above but also other expenses made necessary by the Turnpike and Parkway, which expenses are not reimbursed to the State by the respective Authorities. For example, the State incurs expenses in connection with the enforcement of its drunk-drivers program, the enforcement of its criminal laws through detectives assigned to both roads, the administration of the Division of State Police, the operation of scientific facilities and communication systems with the two toll roads, and the enforcement of traffic safety programs, such as the fatal accident program and the excessive speed program (29% of the violations of which occur on the Turnpike and Parkway).

The trial court was of the opinion, and the plaintiffs here contend, that the term "highway" in *N.J.S.A.* 48:4-20 is ambiguous and therefore extrinsic aids should be used in determining its meaning. In pursuing this approach to the problem, the trial court found three reasons (in addition to the one discussed above) to support its conclusion that the Turnpike and Parkway are not "highways" within the meaning of the statute. The reasons given are:

1. The public policy of this State to abolish private toll roads and to make all roads free for public use prior to the enactment of *N.J.S.A.* 48:4-20 made it unlikely that the Legislature intended the word "highway" as used therein to include toll roads.

2. Since *N.J.S.A.* 48:4-20 and 48:4-32 provide that the tax and a statutory penalty for its nonpayment shall be appropriated to the State Highway Department "for the construction and maintenance of highways" and since the State Highway Department could not legally use the tax monies for construction of private toll roads, the word "highway" in those sections must have meant free public roads and accordingly, "highway" in *N.J.S.A.* 48:4-20 also

meant only free public roads under the rule of construction that a word should be given the same meaning throughout an enactment.

3. The Turnpike Authority and the Highway Authority are independent corporate entities whose roads are not "highways of this State" within the meaning of *N.J.S.A.* 48:4-20 because their roads are similar to private toll roads shown under point 1 above to be excluded from the statute.

We believe that construction of the meaning of the word "highway" in *N.J.S.A.* 48:4-20 by the trial court was unnecessary since, as shown above, we are of the opinion that the word "highway" and particularly "any highway" is clear and unambiguous and within its ordinarily understood meaning encompasses roads such as the Turnpike and Parkway. "Extrinsic aids are never used to create an ambiguity, only to resolve one." *Myers v. Cedar Grove Tp.*, 76 *N.J.* 51, 61 (1961). When it is recognized that the new situation is within the language of the enactment, the inquiry becomes whether its inclusion is consistent with the legislative purpose. It is clear that the above arguments of the trial court, relied on here by the plaintiffs, do not clarify the legislative purpose, nor do they show that imposing the tax with respect to Turnpike and Parkway mileage would be inconsistent therewith. The public policy to abolish private toll roads at the time of the enactment of *N.J.S.A.* 48:4-20, if it relates at all to the purpose of taxing interstate buses, would seem more compatible with the imposition of a tax for their use than with an exemption for mileage traveled on such roads. Likewise, the provisions for the use of tax revenues in *N.J.S.A.* 48:4-20 and *N.J.S.A.* 48:4-32 do not indicate an intention to restrict the imposition of the tax, particularly where the result would be inconsistent with the purpose of requiring the taxpayers to bear their fair share of taxation. The rule relied on by the trial court was stated by Justice Heher as follows:

> "It is an elementary rule in aid of interpretation that, barring differentiation in the context, where the same word or phrase is used more than once in a statute in relation to the same subject matter and in one connection its meaning is clear and another it is doubtful or obscure, it is in the latter case given the same construction as in the former." *Harper* v. *New Jersey Mtrs. Cas. Ins. Co.*, 1 *N.J.* 93, 101 (1948) (dissenting opinion) quoted at 73 *N.J. Super.* at 105.

It is clear that the rule has no application to the present case under our view of the problem presented, since we find no ambiguity in the word "highway" as used in *N.J.S.A.* 48:4-20. Moreover, there is a differentiation in the context and the subject matter in which the word is used in the seconds compared, i.e., *N.J.S.A.* 48:4-20 refers to the imposition and measure of the tax, whereas *N.J.S.A.* 48:4-23 and *N.J.S.A.* 48:4-32 refer only to the use to which revenues collected will be put.

Our discussion of point 1 raised above disposes also of point 3. But in any case, the Turnpike Authority and the Highway Authority cannot be equated to private companies operating toll roads. These Authorities have been designated as instrumentalities and agencies of the State by the statutes creating them. In effect, they are arms of the State government operating certain highways for the State. As said by Justice Heher in *Behnke*, *supra*, 13 *N.J.* at 29:

> "The construction and operation of ~~this~~ toll facility [Parkway] compose a State project for public use, and it does not matter that for administrative reasons deemed good and sufficient the fulfillment of the project was entrusted to an autonomous body created by the State. The Authority is but the instrument by which the work is to be accomplished; the highway and all its property are held for the State; the corporate body exercises a public function on behalf of the sovereign, and is subject to control and dissolution by the sovereign which gave it being conditioned only upon observance of the constitutional guarantees against

the impairment of the obligation of contract. *New Jersey Turnpike Authority* v. *Parsons*, 3 *N.J.* 235 (1949)."

Plaintiffs urge that where the import of a statute is doubtful, the practical construction put upon it over a long period of time by an agency charged with its enforcement is of some weight in determining its proper significance. We have considered the opinion of the Attorney General rendered in 1950, on the basis of which Turnpike and Parkway mileage was exempted from the tax. Although administrative interpretation of a statute is entitled to weight in determining its meaning, where that interpretation conflicts with our view of the plain meaning of the language used and the statutory purpose, we should not hesitate to reject it. Sutherland, *op. cit. supra* § 5104. Moreover, we should also give some weight to the Attorney General's opinion rendered in 1960, which reconsidered and revised the earlier administrative interpretation. "The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons." *Burnet* v. *Chicago Portrait Company*, 285 *U.S.* 1, 16, 76 *L. ed.* 587, 595 (1932). Plaintiffs additionally argue that *N.J.S.A.* 48:4-21, which provides for filing a report of the tax under *N.J.S.A.* 48:4-20 and which uses the statutory language "over the highways of this State," was re-enacted in 1958 (*L.* 1958, *c.* 171) and that the Legislature thereby approved the interpretation of the Attorney General in 1950. We note that the legislative action in 1958 was concerned only with administrative detail* and not with substantive provisions. As Chief Justice Warren said, "Reenactment . . . is an unreliable indicium at best." *Commis-*

*The day of the month on which the report was due was changed from the "tenth" to the "twenty-fifth," and the designation of the administrative head was changed from "commissioner of motor vehicles" to "Director of the Division of Motor Vehicles."

sioner v. *Glenshaw Glass Co.*, 348 *U.S.* 426, 431, 99 *L. ed.* 483, 490 (1955). And when, as here, it does not appear that the administrative interpretation has been considered by the Legislature in its re-enactment, it has been said that the basis for the re-enactment rule vanishes. 1 Davis, *Administrative Law*, § 5.07, *p.* 334 (1958). In any case, a later administrative interpretation will be permitted to alter a former re-enacted construction, although not retroactively. *Helvering* v. *Wilshire Oil Co.*, 308 *U.S.* 90, 100, 84 *L. ed.* 101, 107 (1939).*

In view of the foregoing, we conclude that the term "highway" in *N.J.S.A.* 48:4-20 includes the New Jersey Turnpike and the Garden State Parkway, and accordingly the tax imposed thereunder applies to mileage traveled by interstate buses on those roads.

II

Plaintiffs' constitutional attack against the imposition of the tax on Turnpike and Parkway mileage is twofold. They contend that the application of *N.J.S.A.* 48:4-20 to mileage traveled by interstate buses on the Turnpike and Parkway constitutes an unlawful burden on interstate commerce in violation of the Commerce Clause and denies them equal protection contrary to the Fourteenth Amendment.

Plaintiffs' argument that the interstate autobus excise tax as applied to Turnpike and Parkway mileage offends the Commerce Clause is substantially as follows: (1) Since they pay tolls directly proportioned to Turnpike and Parkway use which are fully compensatory for the costs of con-

*At the oral argument the State conceded that if it attempted to apply the statute retroactively for years prior to 1960 on the basis of a favorable decision here, a substantial issue as to the validity of its action would be presented. We gather that the State does not intend to tax for years prior to 1960.

struction, maintenance, and policing of the Turnpike or Parkway, the imposition of an additional ½ cent a mile tax must exceed reasonable compensation for the use of those roads; (2) the formula as applied to toll-road mileage therefore bears no reasonable relation to a fair charge for the privilege granted; (3) the tax is therefore an attempt to tax general governmental costs to interstate buses as a condition of their operations; and (4) that such a tax is invalid as a direct burden on interstate commerce.

Plaintiffs do not dispute that a state may impose a reasonable, nondiscriminatory tax upon interstate carriers which use its highways to compensate the State for the cost, maintenance and repair of its highways and for the cost of administering traffic regulations. *Capitol Greyhound Lines* v. *Brice*, *supra*. The *Brice* case established the proposition that such a tax will be upheld unless it is shown that: (1) the tax discriminates against interstate commerce in favor of intrastate commerce; (2) the tax is imposed on the privilege of doing an interstate business as distinguished from a tax exacting contributions for road construction and maintenance or for administration of road laws; or (3) the amount of the tax exceeds fair compensation to the state. 339 *U.S.* at 544, 94 *L. ed.* at 1055.

Plaintiffs' contention that the toll plus the tax exceeds fair compensation to the State is predicated on the theory that the toll and the tax are levied for the same privilege, *i.e.*, the use of the Turnpike or Parkway, and that the toll is "fair compensation" for that privilege. The fallacy in this contention is that the toll is not to be equated with the tax. A different privilege is granted by each.

The tax has been imposed by the Legislature on interstate autobuses using State highways in order to require them to bear their fair share of taxation, *i.e.*, to contribute to highway construction, maintenance, and policing costs. The purpose is not only declared by the statutory declaration of purpose but it is also evident from the original

statutory dedication of funds to the Highway Department for use for construction and maintenance of highways. *N.J.S.A.* 4[illegible]4-23. On the other hand, the Turnpike or Parkway toll, while it is intended to compensate the Authority (and indirectly the State) for costs of construction, maintenance, and operation of the toll road used, is in the nature of a special tax levied for the use of a special facility. *Cf. Port of N.Y. Auth.* v. *Hackensack Water Co.*, 41 *N.J.* 90, 106 (1963). The Turnpike and Parkway are in the nature of luxury roads, and their users derive substantial savings of time and fuel and also benefit from the advantages of a safer route. The assumption underlying the operation of such roads is that the saving of time and money and the additional convenience resulting from the use of these roads rather than alternate highways provide the user with benefits equivalent to the amount of tolls charged. The toll does not serve the same purpose as the excise tax, since its proceeds are specifically allocated to the costs of the particular road. The costs to the State of providing and maintaining a network of highways has not decreased since the Turnpike and Parkway became available, but on the contrary, the evidence indicates there are additional and increased burdens on the State in providing and improving subsidiary roads to handle the increased traffic generated by Turnpike and Parkway users. The Turnpike and Parkway do not exist in a vacuum, they are but two roads in the network of New Jersey highways available to and used by interstate autobuses. The interrelationship of the Turnpike and Parkway with the rest of the New Jersey highway system presents problems and burdens to the State. Interstate autobus operators using these toll roads can be asked to contribute their fair share toward meeting the costs of these problems and burdens.

Since the purpose of the tax is valid, *i.e.*, compensation for the privilege of road use, if the tax is nondiscriminatory, it must be upheld unless the plaintiffs show that it is excessive. *Capitol Greyhound Lines* v. *Brice*, *supra*.

Plaintiffs contend that the tax must be deemed excessive since it bears no reasonable relationship to the privilege granted, *i.e.*, that a fair compensatory tax for the use of highways cannot be computed by considering toll-road mileage.

A tax for the use of highways need not bear any specific relationship to the extent of road use. *Kane* v. *New Jersey*, *supra*. A mileage tax is normally considered to be prima facie compensatory because it is directly proportional to road use. But a formula not related to road use will be upheld unless the challenger shows that the result of the tax is an unreasonable burden on interstate carriers. *Capitol Greyhound Lines* v. *Brice*, *supra*. Because of the countless factors involved in determining fair compensation, it is enough if the formula results in a "rough approximation" of fair compensation. 339 *U.S.* at 546, 94 *L. ed.* at 1057.

As shown in Part I of this opinion, the State incurs many expenses in connection with the use of the Turnpike and Parkway. Subsidiary roads are high cost roads to the State because of the traffic congestion thereon resulting from Turnpike and Parkway traffic. And the State incurs other expenses in the administration of its road laws in connection with toll road use. The fact that the particular road used by the taxpayer does not derive a direct benefit from the tax imposed for its use does not affect the validity of the tax. See *Dixie Ohio Express Co.* v. *State Revenue Com.*, 306 *U.S.* 72, 77, 83 *L. ed.* 495, 499 (1939). And the fact that the use of the Turnpike or Parkway may be less burdensome financially to the State (aside from the expenses of the respective Authorities) than other highways in the States does not destroy the validity of the measure of the tax if the result of the tax is fair compensation to the State. As was said in *Hendrick* v. *Maryland*, 235 *U.S.* 610, 624, 59 *L. ed.* 385, 391 (1915) with respect to state taxes for road use:

> "The amount of the charges and the method of collection are primarily for determination by the state

itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce."

Here the tax is measured by the miles traveled within the State. The formula used in imposing the tax is not a measure of constitutionality so long as it may be deemed a reasonable exercise of legislative judgment. See *Brice, supra*, where Justice Black discusses the many and varied measures, *e.g.*, chassis weight, tonnage capacity or horsepower, which have been upheld against constitutional attack. 339 *U.S.* at 544, 94 *L. ed.* at 1056. It is a reasonable exercise of legislative judgment that the amount of the tax due as a contribution from interstate bus users shall be measured by the miles traveled over all roads in the State.

Moreover, the tax does not fall as "double taxation," as urged by the plaintiffs, because a toll is also charged for use of the roads. The State may lay more than one tax for the privilege of road use. See *Interstate Busses Corp.* v. *Blodgett*, 276 *U.S.* 245, 72 *L. ed.* 551 (1928). The test is whether the taxes imposed result in an unreasonable amount in the aggregate. As was said in *Bode* v. *Barrett*, 412 *Ill.* 204, 106 *N.E. 2d* 521, 531 (1952) *aff'd* 344 *U.S.* 583, 97 *L. ed.* 567 (1953): "The proper test of constitutionality is whether or not the total of excise taxes levied for the privilege of using State roads produces an amount which is shown to be in excess of fair or reasonable compensation to the State for such privilege." There has been no showing that the total taxes paid by plaintiffs plus tolls paid for the Turnpike and Parkway exceed fair compensation for the use of State highways. *Cf. Shirks Motor Express Corp.* v. *Messner*, 375 *Pa.* 450, 100 *A. 2d* 913 (1953) *app. dism. sub. nom. Interstate Motor Freight System* v. *Messner*, 347 *U.S.* 941, 98 *L. ed.* 1090 (1954).

We conclude that the tax is not imposed for the privilege of doing an interstate business nor does the amount of

the tax exceed fair compensation to the State. Accordingly, unless it discriminates against interstate commerce in favor of intrastate commerce it does not violate the Commerce Clause.

Plaintiffs list the taxes imposed on them by New Jersey and assert that although they pay all taxes paid by intrastate carriers, they pay in addition the interstate autobus excise tax imposed by *N.J.S.A.* 48:4-20, and that no similar tax is paid by intrastate carriers, either on the Turnpike and Parkway or on other State highways. Thus, they claim that the mileage tax is discriminatory since it is not imposed on autobuses carrying passengers in intrastate commerce. But, intrastate autobus operators pay a gross receipts tax for the privilege of intrastate operation levied under *N.J.S.A.* 48:4-14 which provides:

> "Every person owning or operating an autobus in any municipality of this State, shall, on or before the twenty-fifth day of each calendar month, file with the chief fiscal officer of the municipality a statement, verified by oath, showing the gross receipts from the business of such autobus or busses during the preceding calendar month, and shall at the same time pay to such fiscal officer of such municipality 3% of such gross receipts as a monthly franchise tax for revenue for the use of the streets; provided that if the scheduled bus miles over which the autobus is operated shall extend beyond the limits of such municipality, such person shall include in such statement the length of the scheduled bus miles over which the autobus is operated both within and without the municipality, and shall pay as such franchise tax to such municipality 3% of such proportion of the gross receipts as the length of the scheduled bus miles operated in the municipality bears to the entire length of the scheduled bus miles operated both within and without the municipality; provided, however, that none of the provisions of this article shall be applicable to a charter bus operation or special bus operation.

> The sum accruing to any municipality under this section when paid shall be in lieu of all other franchise taxes and municipal license fees.'"

There is a total lack of proof in the record that the 3% gross receipt tax imposed on intrastate carriers results in a lesser burden on those carriers than the burden imposed on interstate carriers by the mileage tax of *N.J.S.A.* 48:4-20.* In the absence of evidence that the tax on interstate carriers results in a heavier financial burden than the tax imposed on intrastate carriers, it cannot be said that the tax levied on interstate carriers is discriminatory merely because it differs in form or adopts a different measure or method of assessment. *Interstate Busses Corp. v. Blodgett, supra,* 276 *U.S.* at 251, 72 *L. ed.* at 554. In that case the appellant, an interstate carrier, contended that it was discriminated against in favor of intrastate carriers by the Connecticut tax statutes which imposed a mileage tax on interstate carriers and a gross receipts tax on intrastate carriers similar to those imposed by our statutes. In rejecting this contention, the Court said:

> "'To gain the relief for which it prays appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it.'" 276 *U.S.* at 251, 72 *L. ed.* at 555.

However, plaintiffs contend that they also pay the tax imposed under *N.J.S.A.* 48:4-14. Our examination of the record indicates that this tax is paid only when the interstate operator has elected to do an intrastate business con-

*"Autobus" is defined in *N.J.S.A.* 48:4-1 as follows: "The term 'autobus' as used in this chapter means and includes, except as hereinafter noted, any motor vehicle or motorbus operated over public highways or public places in this State for the transportation of passengers for hire in intrastate business, notwithstanding such motor vehicle or motorbus may be used in interstate commerce."

current with his interstate journey, in which case he pays the same tax as the intrastate carrier, *i.e.*, 3% of his gross receipts collected in intrastate commerce. Moreover, an interstate operator who is also engaged in an intrastate operation and thus subject to the gross receipt tax, may deduct from the miles traveled on the interstate journay (and subject to the ½ cent mileage tax) those miles he operates within the municipality and upon which he is paying the gross receipt tax. In other words, full credit is allowed on the mileage tax for all miles subject to the gross receipts tax.

Since intrastate carriers are taxed under *N.J.S.A.* 48:4-14 for the use of highways, and since the interstate operator does not pay this tax unless he elects to do a concurrent intrastate business, and in the absence of proof that in actual practice the tax imposed on the plaintiffs is more burdensome than that imposed on intrastate carriers, we conclude that *N.J.S.A.* 48:4-20 does not discriminate against interstate autobus operators in favor of intrastate autobus operators.

In view of the above, we find that the tax imposed under *N.J.S.A.* 48:4-20 does not offend on its face or in its application to plaintiffs' operations the Commerce Clause of the Federal Constitution, and it does not deny plaintiffs equal protection under the Fourteenth Amendment. Since we are of the opinion that the tax was properly imposed, it is unnecessary for us to review the trial court's decision that no interest is payable on the tax collected.

The judgment of the Superior Court, Law Division, is reversed.

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 4306

Civil Action On Appeal

Mandate on Reversal

This cause having been duly argued before this Court by Mr. Alan B. Handler, counsel for defendants-appellants and cross-respondents and Mr. Merritt Lane, Jr., counsel for plaintiff-respondent and cross-appellant, Greyhound Corp., and Mr. William A. Roberts, of District of Columbia Bar, counsel for plaintiff-respondent and cross-appellant, Safeway Trails, Inc., etc., and Mr. George M. Eichler, counsel for plaintiffs-respondents and cross-appellants, Lincoln Transit Co. Inc., etc., et al., and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the third day of February, 1964.

Filed Feb. 3, 1964
John H. Gildea, *Clerk*

JOHN H. GILDEA,
Clerk of the Supreme Court